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IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted]7

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

H. B. ZACHRY COMPANY,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 963

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the District Court on the Petition for Preliminary Injunction (R. 78-84) is not reported. The memorandum opinion of the District Court, upon final disposition of the case (R. 131-142,), is reported unofficially at 13 W. H. Cases 881. The opinion of the Court of Appeals is reported at 262 F(2d) 546, and is contained in the Appendix to the Petition.

JURISDICTION

The Petition recites the requisites for jurisdiction.

QUESTION PRESENTED

In general terms, the question in this case is:

> Were the construction workers of Respondent, while working on the dam project, engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended?

However, under the facts and under the controlling definition contained in the Act, Respondent's employees can be deemed to have been engaged "in the production of goods for commerce" only if they worked in a process or occupation "closely related" and "directly essential" to the actual physical manufacturing of such goods. Hence, as a refinement of the general question stated above, the precise question involved herein is:

> Were the construction workers of Respondent, while working on the dam project, employed in a process or occupation *closely related* and *directly essential* to the actual physical production of goods for commerce?

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.)* are as follows:

"Sec. 3. As used in this Act—

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any *closely related* process or occupation *directly essential* to the production thereof, in any State.

"Sec. 7 (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

REGULATION INVOLVED

Part 776, Tit. 29, Labor, c. V, Wage and Hour Division, Department of Labor, Sec. 776.20(b) of the Code of Federal Regulations, as amended (3 CCH L.L.R., par. 24,102.20), provides as follows:

"The Act's definitions do not, however, include as 'goods' such things as *dams*, river improvements, highways and viaducts, or railroad lines."

STATEMENT

This is not an "in commerce" case; rather, it is a "production of goods for commerce" case. It hinges on the activities of Respondent's workers at the new Wesley E. Seale Dam site located on the Nueces River near Mathis, Texas, some 42 miles distant from Corpus Christi, Texas (R. 48). The Nueces River is a local stream situated entirely within the State of Texas (R. 51).

In 1955, as a result of competitive bidding, Respondent was awarded a contract to construct the dam. The owner and contracting party with Respondent was the Lower Nueces River Water Supply District. The District is a "governmental agency, a body politic and corporate, and a municipal corporation," Art. 8280-134(14), Vernon's Annotated Civil Statutes of Texas. It was created by an Act of the Legislature of the State of Texas, Acts 1949, 51st Legislature, c. 159, p. 326, Art. 8380-134, V.A.C.S. (R. 47), which Act has been held constitutional by the Courts of Texas, *Lower Nueces River Water Supply District v. Cartwright*, 274 S.W.(2d) 199 (writ refused, n.r.e.). The District and the City of Corpus Christi "are separate governmental agencies" (R. 48).

Upstream from the Mathis Dam[1] at a distance varying from 1,300 to 1,500 feet there is a smaller dam which has been there for years and which is

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[1] The Wesley E. Seale Dam is commonly known as the "Mathis Dam," and both Petitioner and Respondent have employed the latter name throughout this litigation.

referred to as the "old dam" (R. 44-46). The relative positions of the two dams are depicted in the photograph which is Plaintiff's Exhibit No. 5, and which is before this Court in original form (R. 44). The old dam impounds approximately 34,000 acre feet of water, whereas the new Mathis Dam will impound slightly more than 300,000 acre feet (R. 45). When the reservoir behind the Mathis Dam is filled, the old dam "will be inundated by the new lake," and the old dam will be partially breached (R. 46). The old dam is also owned by the District.

The District has a contract with the City of Corpus Christi whereby the District has agreed to sell to the City all water impounded by the Mathis Dam (R. 41, 45, Pl. Ex. No. 1). Water so sold will travel down the bed of the Nueces River some 26 miles to a treatment plant at Calallen, Texas. After being treated at Calallen, the water will travel an additional 16 miles (for a total journey of 42 miles from the dam) where it will go into the Corpus Christi water distribution system (R. 48). Once the water enters such distribution system, it will be sold by the City to the same general type of customers that are found in any city. Corpus Christi classifies these customers as residential, commercial, seasonal, hospitals, schools, churches, city and industrial (R. 56).

Included among the customers are some industrial plants which manufacture goods for commerce. Direct evidence was introduced as to only one such customer (R. 61); but, to shorten the record, it was agreed that the City of Corpus Christi sells water to various industrial plants located in and near

the City, and that such plants produce goods for interstate commerce (R. 63-64). It was undisputed that water used by these industrial customers does not become a part of the products which they produce for commerce. Rather, in the words of the trial court, such water "is used for cooling towers and engines and so forth" (R. 64).[2]

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[2] At two places in his Petition (pp. 8, 24n), Petitioner contends that the water impounded by the dam will become an "ingredient" of goods moving in interstate commerce, and Petitioner states that he will further develop this point if certiorari is granted. To support his contention, Petitioner cites only a terse collateral remark made by the trial court in its initial order denying the preliminary injunction—which order, of course, is not the final judgment here under review.

Petitioner's "ingredient" claim can best be disposed of by quoting the *only* part of the record in which such matter is even alluded to. The lone witness who testified how water is used by the industrial plants was asked whether it is used in connection with cooling towers and condensation towers. When such question was asked, the following colloquy ensued:

"THE COURT: It [the water] is not part of the product, it is used for cooling towers and so forth.

"COUNSEL FOR RESPONDENT: So far as I know, none of them are part of the product, but—

"THE COURT: So far as I know, none of them are. *Do you know of any that water is a part of their product?*

"THE WITNESS: *No sir.*

"THE COURT: *Any appreciable part of the product?*

"THE WITNESS: *No, sir.*

"COUNSEL FOR PETITIONER: I am sure they try to keep it out of their petroleum products."

With this being the sole evidence pertaining to Petitioner's "ingredient" point, it would appear plain that such point is not in this case. Petitioner himself admits (p. 24n) that the point "has not hitherto been pressed in this case."

Also, Petitioner agreed that the water itself is not sold in interstate commerce either by the City or by its industrial customers (R.64).

Finally, it should again be noted that the industrial customers who produce goods for commerce purchase water from the City, rather than from the District. Such customers have no contractual relationship whatever with the District (R. 66); and they certainly have no contractual relationship with Respondent or its employees.

Respondent was building a dam. Its employees were solely engaged in building such dam. A dam is not "goods" within the meaning of the Fair Labor Standards Act.

The dam will impound water. No one has contended that such water will be "goods" under this Act, or that the water itself will in any way be "produced" for commerce.

Rather, the only "goods" involved in this case are the various products which are manufactured for interstate commerce by the industrial plants located in or near Corpus Christi and which have water used in the process by which they are produced—water purchased by the industrial plants from the City of Corpus Christi, with the City in turn purchasing such water from the District; with the Distrist acquiring and being able to sell such water only by virtue of the fact that it employed Respondent to build the Mathis Dam; with Respondent having built the Dam by using its employees; and

with such employees, their activities, and the wages paid to them by Respondent, being the subjects of this suit.

As provided in its contract with the District, Respondent paid its employees time and one-half for all hours worked in excess of eight each day, and for all hours worked on Sundays and holidays, but Respondent did not pay overtime based on a forty-hour work week as called for by the Fair Labor Standards Act. Respondent used the wage formula called for by its contract with the District, rather than the formula required by the Act, because its legal staff had advised it that the Act did not cover the Mathis Dam project (R.124).[3]

[3] Economists can well debate whether the "overtime after 8 hours per day" formula used on this job by Respondent or the "overtime after 40 hours per week" required by the Act is, in the long run, more beneficial to employees. Certainly, in many cases—especially in the construction industry where the work week often is shortened by weather conditions—the formula used on this job by Respondent provides overtime pay for employees when that prescribed by the Act does not. Contrariwise, in some instances the Act's formula provides for overtime when the "overtime after 8 hours per day" formula does not. In any event, this is not a case in which the employer blithely disregarded the matter of overtime. Rather, Respondent paid overtime on Sundays and holidays exactly the same as it would have paid if it had thought the Act applied. Since it did not think that the job was covered, Respondent followed the terms of its contract with the District; and, on weekdays, paid time and one-half for overtime, but did so for pay periods in excess of 8 hours per day, rather than in excess of 40 hours per week. Hence, on the matter of overtime pay, Respondent's employees were not exactly being ground under the heel of their employer. For an exposition of the mathematics of this matter, see pages 6-9 of Respondent's brief in the Court of Appeals.

If a construction job is unique—if its relationship to commerce is such that it does not fit into a pattern of prior work—Respondent always asks its legal staff to review the situation and to advise it whether the Act is applicable (R.120-121). That procedure was followed on the Mathis Dam project. The legal staff first gave an oral opinion that the project was not covered, but then, to be doubly sure, Respondent asked its legal department to review the matter and to issue a written opinion. The written opinion also was to the effect that the job was not covered (R 124-125).[4]

The trial court held that Respondent's construction workers were engaged "in the production of goods for commerce" and were, therefore, covered by the Act. Accordingly, that court granted the in-

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[4] Neither Respondent nor its legal staff treats lightly the matter of coverage under the Act. On the contrary, in a vast majority of cases both have agreed that Respondent's employees are covered. Figures for the period immediately prior to trial are as follows (R. 109-116).

Year	Total Jobs	Value	Under The Act	Not Under The Act	Percentage Under The Act
1956	78	$34,352,000	74	4	94.9%
1957	74	$20,000,000	73	1	98.6%
1958 (to trial)	33	$23,907,000	31	2	93.1%
Total	185	$77,449,000	178	7	96.2%

Thus, the Mathis Dam job does not fit into any pattern of non-compliance, or of refusal to recognize coverage. Rather, it is merely one of the very few—3.8% of the total, or 7 out of 185—in which Respondent and its legal staff have not concluded that coverage exists.

junction prayed for, except that the injunction was limited in scope to the performance of the Mathis Dam contract (R. 142, 143-144).

The Court of Appeals for the Fifth Circuit reversed the coverage ruling and held that the employees at the Dam were not covered by the Act, 262 F (2d) 546.

ARGUMENT

This case is *sui generis*. Its singular facts gave rise to the decision of the Court of Appeals, and such decision clearly is correct. No important question of federal law is involved, and Petitioner's footnote citations of government publications and of a gazetteer do not transmute the case into one of earthshaking proportions. The asserted conflict of decisions is a sham.

I.

The Uniqueness Of The Facts

Petitioner's statement of the case is arrantly adroit. Stressed are the obvious facts that water presents a problem of national scope; that Respondent handles large projects in several states; and that Corpus Christi makes significant contributions to the Nation's economy. Suppressed or subordinated are most of the facts demonstrating the local nature of Respondent's construction of the Mathis Dam. Utterly lacking is any proof of the nature of the

employees' activities in constructing such dam.[5] So dense is the interstate aura created by Petitioner that one must emerge from the Petition and seize upon the record for even a breath of intrastate air, as well as for illumination.

As is said above, this is not an "in commerce" case. Rather, it is wholly a "production of goods for commerce" case. Petitioner has framed both his pleadings (R. 6-7) and his Petition (p. 2) upon the "production of goods for commerce" portions of the Act, and the case was tried upon such theory. The trial court held that only such portions of the Act are involved (R. 137), and the Court of Appeals rightly said:

> "The Secretary concedes that the construction workers were not engaged 'in commerce.' If, therefore, his views are to prevail it must be on the basis of their being engaged 'in the production of goods for commerce.' Since obviously they are not actually, while building the dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute,

[5] Petitioner offered not one whit of evidence to establish the nature of the activities of Respondent's employees, and such failure was assigned by Respondent as error in its Brief in the Court of Appeals (pp. 14, 17-21). The rationale of the decision of that Court made unnecessary a discussion of this point in the Court's opinion. The point is, however, both sound and important, and it affords an independent basis for upholding the reversal of the judgment of the trial court. For the convenience of this Court, a summary of the authorities dealing with such failure of proof is contained in Appendix "A" hereto, pp. 23, infra.

> 203(j), to the effect that the construction workers are employed 'in [a] *closely related* process or occupation *directly essential* to the production' of goods."

In *10 East 40th Street Building, Inc. v. Callus*, 325 U. S. 578, 65 S. Ct. 1227, this Court observed that it has the:

> "responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industry situations."

Certainly, in the case at bar, there is a most complicated and unique industry situation which has called for the making of such an *ad hoc* determination by the Court of Appeals—a situation so unique and so complicated that the goods ultimately entering into commerce are far distant from the activities of Respondent's employees as a matter of physical causation, as a matter of contractual connections, and also as a matter of geography.

Geography doubtless is least important, but even measured by it, the water impounded by Mathis Dam travels 26 miles down the bed of the Nueces River to the water purification plant at Calallen, where its journey is interrupted for treatment; it travels an additional 16 miles before it enters the distribution system of Corpus Christi; and it then follows the ramifications of that system for an undetermined distance before it happens to become a collateral factor in the production of nylon, chemicals, or petroleum products which are shipped in interstate commerce.

The contractual connection between Respondent's employees and the goods ultimately destined for commerce is even more remote. Apart from the contracts between Respondent and its employees, there first exists the contract between Respondent and the District for the construction of the Dam; there follows the contract between the District and the City of Corpus Christi for the sale of the water; there then ensues the contractual relationship between the City and its industrial customers for a further sale of the water; and there finally exist unknown contracts which provide for the industrial production of goods for commerce and which involve the use of water as an incident thereof.

Finally, as a matter of cause and effect, causation exists in this case only in the sense that it exists in a Rube Goldberg contraption. Whatever activities each of Respondent's employees performs ultimately leads to the existence of Mathis Dam; the existence of the Dam causes water to be impounded in a reservoir behind it; the accumulation of water makes possible the creation and existence of the purification plant at Calallen; that plant makes water suitable and available for use by residents of the City of Corpus Christi; the suitability and availability of the water result in its use by industrial plants; and, eventually, someone working in such a plant takes a drink of the water or puts it into a boiler or cooling tower in connection with the production of goods some of which ultimately find their way into interstate commerce.

If, as this Court recognizes, questions of the type involved in this case require *ad hoc* factual determinations of coverage under this Act, can it possibly be thought that the facts herein will again arise for decision in the foreseeable future? Contrariwise, is not this case bottomed upon its own peculiar facts, and is it not best than nothing be said or done herein which might interfere with similar just and equitable *ad hoc* decisions under whatever individual facts might be presented in future cases?

II.

The Correctness Of The Decision Below

With the decision in this case necessarily turning upon whether the activities of Respondent's employees were "closely related" or "directly essential" to the production of goods some 42 miles and three or more contractual connections distant, the decision of the Court of Appeals that no such close and direct relationship existed was clearly correct. To repeat an expression used above, in a remote Rube Goldbergish sense there exists in this case a causal connection between an employee of Respondent who scooped dirt or mixed cement on the Mathis Dam, and the nylon, chemicals or petroleum products which emerged at plants in or near Corpus Christi. However, as this Court said in the *Callus* case, supra;

> "merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not

bring it within the scope of the Fair Labor Standards Act."

As spelled out in the Fair Labor Standards Act, the terms "closely related" and "directly essential" must mean something in the chain of causation. Whatever they mean must be much more narrow than the test of being "*necessary* to the production" of goods for commerce, which test was employed in the Act prior to 1949. As the Court of Appeals recognized, the change in the language of the Act which was made in 1949—the elimination of the "necessary" test and the substitution of the "closely related" and "directly essential" requirements—obviously meant something. If the language of the change does not explain itself, the legislative history thereof leaves no doubt but that the change was intended to narrow the scope of the Act, and to remove therefrom local activities not intimately related to the actual production of goods. As the Department of Labor itself said in its administrative regulations interpreting the Act, Sections 776.0 to 776.30 of the Code of Federal Regulations (3 CCH L. L. R., par. 24,102.17):

> "'The legislative history shows that the new language in the final clause of Section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage (engaged neither 'in commerce' nor in actually 'producing or in any other manner working on 'goods for commerce') whose coverage under the Act formerly depended on whether their work was 'necessary' to the production of goods for commerce. *Some employees whose work*

> *might meet the 'necessary' test are now outside the coverage of the Act because their work is not 'closely related' and 'directly essential' to such production...*
>
> "...
>
> "*No precise line of inclusion or exclusion may be drawn;* there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions by the courts."

Even under the "necessary" test which existed under the pre-1949 language of the Act, this Court observed, again in the *Callus* case, that:

> "Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. *But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line.*"

If remoteness was a relevant factor in drawing the line even under the pre-1949 wording of the Act, then it is even more a factor under the "closely related" and "directly essential" requirements of the present Act. As the Labor Department itself recognizes "no precise line of exclusion or inclusion may be drawn." However, if the facts of the instant case do not reveal prohibited remoteness, then what possibly can constitute remoteness, and under what conceivable state of causal facts could it ever exist?

III.

The Lack of Any Important Federal Question

Certainly, the facts of this particular case raise no important federal question. To such facts, the Court of Appeals applied the "closely related" and "directly essential" tests. Far from borning any important federal question, the Court's application of these tests was dictated and required by the positive language of the Act. By making an "*ad hoc* determination"—by following the Labor Department's own recognition that "no precise line of inclusion or exclusion may be drawn"—that Court concluded that the building of Mathis Dam is too remote from the production of goods for commerce to be covered by the Act. This obvious conclusion led to the holding herein, and such holding is not exactly one which will shake either the economy or the jurisprudence of the Nation.

In an endeavor to prove that somehow, in someway, the decision below has an importance over and beyond the facts of this particular case, Petitioner adverts to this Court's decision in *Mitchell v. Vollmer & Co.*, 349 U. S. 427, 75 S. Ct. 860, and Petitioner argues that the Court of Appeals is attempting to sabotage that decision. In particular, Petitioner points to the ruling in the *Vollmer* case to the effect that coverage under the Act is to be:

> "determined by practical considerations, not by technical conceptions,"

and Petitioner avers that the Court for the Fifth Circuit is ignoring such principle.

Far from ignoring this salutary principle, the Court of Appeals has recognized and applied it in this case, citing, *inter alia*, *Mitchell v. Empire Gas Engineering Co.*, 256 F(2d) 781, wherein the Court echoed this Court's words in the *Vollmer* case to the effect that:

> "the Act is to be given a liberal construction. Whether an employee is engaged 'in commerce' within the meaning of the Act is determined by practical considerations, not by technical conceptions."

What the Court of Appeals did herein was to determine this case "by practical considerations"—by the tests of "closely related" and "directly essential." The decision in the case resulted solely from the application of such tests.

Petitioner would have this Court believe that the Court of Appeals tied itself to some sort of rule that "new construction" necessarily is outside the scope of the Act. Prior to this Court's decision in the *Vollmer* case, supra, many persons doubtless believed that "new construction"—as opposed to "repair or reconstruction"—was so immune. The decision in *Vollmer* dispelled any such belief, and Respondent has not argued any doctrine of "new construction" herein. Neither was the Court of Appeals so naive as to rely upon, or revert to, any holding that "new construction," simply because it is new, is exempt

from the Act. Rather, the Court merely correctly perceived and held that the nature of a particular construction project—be it "new construction" or otherwise—is a most relevant factor to be considered in determining whether such project is or is not "closely related" and "directly essential" to the production of goods for commerce.

Likewise, of course, in noting that this Court's decision in the *Vollmer* case was made in an "in commerce" case, rather than in a "production of goods for commerce" case, and in recognizing that the tests of "closely related" and "directly essential" are, by the terms of the Act, made particularly applicable to the latter type of case, the Court of Appeals once again only followed patent principles, rather than making any novel pronouncement of law. Indeed, in the regulation quoted above on page 15, the Department of Labor itself recognized that the "closely related" and "directly essential" tests apply, not to "in commerce" cases and not to cases of work on the "actual production" of goods for commerce, but rather to situations such as the one at bar in which it is asserted that employees are engaged in something less than commerce itself, and something less even than actual production of goods for commerce, to-wit, in some activity which by statutory definition must be closely related and directly essential to the final production of goods which enter the stream of commerce. It ill becomes the Secretary of Labor to assert in this Court that the following of his own regulations creates an important question of federal law, and is erroneous.

IV.

The Asserted Conflict of Decisions

When the normal time for applying for a writ of certiorari herein was on the verge of expiring, and when Petitioner secured an *ex parte* extension of time, Respondent believed that the Solicitor General —in his position of knowing what is happening in the federal courts around the country—must have known of some new development (some pending or prospective lawsuit) which might affect the decision in this case, and which might possibly create a conflict of decisions.

Now, however, it is obvious that there is no such new development. Nothing new in the law pertaining to this case has arisen in recent months, or even in recent years.

In lieu of raising any new development, Petitioner merely warms over old porridge by asserting a conflict between the decision herein and the decisions in *Mitchell v. Chambers Construction Company*, 214 F(2d) 515 (decided in 1954) and *Chambers Construction Company v. Mitchell*, 233 F(2d) 717 (decided in 1956). The Court of Appeals correctly analyzed both of those cases.

In the first case, by the Eighth Circuit, the question here in issue was not decided, and, while affirming the refusal to grant an injunction, the Court merely said that it was "inclined to agree' with the Secretary's contentions.

In the second case, as stated by the Court of Appeals herein, the Court for the Tenth Circuit "equated the new construction conception as to instrumentalities of commerce, *Vollmer v. Mitchell*, supra, with construction of facilities to be used for production of goods," without recognizing the two different bases of coverage and without any application to the latter situation of the tests of "closely related" and "directly essential" activities.

Morever, the facts in the two *Chambers* cases are clearly distinguishable from those at bar since both involved construction work done on *water distribution systems*, rather than on facilities which resulted in the impounding of water that ultimately reached the distribution system. As a result the employees' activities in the *Chambers* cases pertained to the actual distribution of water to industrial plants, whereas in the instant case the building of Mathis Dam was far removed from the distribution systems of Corpus Christi.

A metaphor applied in the first of the *Chambers* cases can well be applied here, to-wit:

> "The question in each case is governed by the facts. Somewhere between the black and white are factual shades of gray, and adjudicated cases serve only to add to the catalogue of colors from which we choose a shade to match our own."

If any doubt exists as to the proper coloration for this case, the Court of Appeals has assigned it

a proper hue in view of its individual facts and the commonplace question of law which it presents.[4]

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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[4] In the final subdivision of his Petition (pp. 27-28), Petitioner requests that this Court not only reverse the Court of Appeals on the matter of coverage, but that it also reverse the action of the trial court wherein the latter court granted Petitioner injunctive relief but limited the injunction to the Mathis Dam project. Respondent finds it difficult to believe that this Court would so reverse the trial court on a matter so peculiarly within its discretion. However, since Petitioner has seen fit to raise this matter of discretion—and especially since he has seen fit to inveigh against the Fifth Circuit for its general standards "warranting denial of injunctive relief," which standards, Petitioner says, "exceed, we believe, the bounds of legal discretion" (p. 27), Respondent is including herein, in Appendix "B", p. 27, matters bearing upon the proper scope of the injunction, if any injunction at all should be deemed justified.

APPENDIX "A"

The Failure of Petitioner To Prove The Nature Of The Employees' Work

As is said above (p. 11 n. 5), Petitioner did not prove the specific nature of any task performed by any employee of Respondent on the Mathis Dam project. The evidence shows that there were more than 300 employees on this job, but Petitioner did not call a single one as a witness; he did not take a single deposition of any employee; and he made no request for admission as to their activities.

Since dams do not build themselves, it is of course an obvious conclusion that Respondent's employees worked at building Mathis Dam. However, as appears from the decisions of this Court which are cited below, the question is not "What was the employer doing?" but rather is "What was the particular employee doing?"

Generally speaking, Respondent's employees were building the Mathis Dam. If any or all of them were under the Fair Labor Standards Act, they necessarily were embraced by the Act because their activities can be deemed "closely related" and "directly essential" to the production of goods for commerce.

If the Government asserts that John Doe, or an unspecified number of John Does, working for Respondent on the Mathis Dam, were entitled to overtime pay because they were under this Act, it must prove that the activities of such persons met

the "closely related" and "directly essential" tests. This, the Government did not even attempt to do.

Perhaps there might be a talented John Doe who was so skilled that his activities were an absolute *sine qua non* to the construction of the Dam. On the other hand, there most certainly were employees who did nothing except feed hay to mules, or pour gasoline into tractors, which furnished a means of locomotion for the scooping of dirt or the quarrying of rock used on the Dam. Without proof of specific activities, can such persons be equated as far as coverage under the Act is concerned? Without proof of what each does, can it blindly be said that the tests of "closely related" and "directly essential" lead to the same results with respect to all employees, or is it not true that the activities of one employee might fall within or without such tests, while application of the tests to the activities of other employees might lead to an entirely different conclusion? If, as is plain from the language of the Act, these tests must be applied to the *particular* activities of *particular* employees, then how can the tests be applied, or the results thereof be judicially declared if, as in the case at bar, the activities are wholly unproved and unknown?

In one of the early cases interpreting the Act, *Kirschbaum v. Walling*, 316 U.S. 517, 62 S. Ct. 1116, this Court said:

> "the provisions of the Act expressly make its application dependent upon the character of the employees' activities."

Soon thereafter, in *McLeod v. Threlked*, 319 U.S. 491, 63 S. Ct. 1248, the Court reiterated that:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. *It is the work of the employee that is decisive.*"

Again, in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 63 S. Ct. 595, the Court reiterated:

> "The nature of the employer's business is not determinative, because as we have repeatedly said, *the application of the Act depends upon the character of the employees' activities.*"

Within this very year, this Court has again endorsed the holding on this point in *Kirschbaum v. Walling* and has said in *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 212, 79 S. Ct. 260, cited by the Government in its Petition herein:

> "To determine the answer to this question [of coverage under the Act] *we focus on the activities of the employees and not on the business of the employer.*"

If, then, the application of the Act "depends upon the character of the employees' activities," how can it possibly be known whether the Act applies until someone proves the nature of the employees' activities which are involved? As the opinion of this Court clearly shows, specific proof of the activities of the particular employees was either made or had by stipulation in *Mitchell v. Lublin*, supra. Without

such proof—and no such proof was had or even attempted in the case at bar—the applicability of the Act to the employees involved in the instant case simply can't be determined.

Since the Petitioner Secretary of Labor brought this suit, he necessarily had the burden of proof therein. Having brought the suit in his official capacity as Secretary of Labor, Petitioner was indeed a "formidable opponent," *(Archer v. Brown Root, Inc.*, 241 F(2d) 663), but once in court he is:

> "in no different position than any ordinary litigant and is, therefore, bound by the same rules of civil procedure in the same prospects as an ordinary litigant." *Mitchell v. Bass*, 252 F. (2d) 513.

Certainly when specific legal standards—"closely related" and "directly essential"—are established as the judicial tests which the courts are to apply to the facts before them, and when the only factual grist which the courts can thus consider is evidence of the particular duties of particular employees, an "ordinary litigant" would indeed be required to show to the courts the duties of such employees.

No lesser burden of proof is accorded the Petitioner Secretary of Labor. Certainly he should not be permitted to go into court and obtain an injunction, with its attending possible criminal penalties, unless in so placing an employer in such a perilous position he at least meets the standards of proof which would be required from any ordinary litigant.

Absent a showing of the activities of the employees who he claims are entitled to overtime pay in this case, Petitioner simply hasn't established that the Act is applicable.

If one of the "John Does" involved in the case sued Respondent under the Act to recover double overtime pay, attorney's fees and costs, he most certainly would have to prove the nature of his activities before he could even invoke the Act. Petitioner Secretary of Labor cannot obtain the injunctive relief sought herein with any less *quantum* of proof.

APPENDIX "B"

The Discretionary Nature Of The Injunctive Relief Sought Herein

In this case, the trial court found coverage, but, in the exercise of the discretion which it plainly possesses, limited the injunction that it granted to the Mathis Dam project, rather than granting a blanket injunction pertaining to all of Respondent's activities.

In the Court of Appeals, Petitioner Secretary of Labor filed a cross-appeal complaining of the scope of the injunction. Since that Court held that no coverage existed, Petitioner's cross-appeal never came to decision.

However, in this Court Petitioner also is contending that, if coverage is found to exist, this Court

should override the discretion vested in the trial court and grant a blanket injunction. Again, this Court's recent decision in *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 212, 79 S. Ct. 260, is pertinent for, even though the Court there held that coverage existed (contrary to the holdings in both courts below), the Court said that, upon its reversal and remand:

> *"it will still be within the discretion of the District Court whether or not to issue an injunction."*

citing *Mitchell v. Bland*, 241 F(2d) 808, wherein the Court held that the trial court:

> "would have been justified in either granting or denying injunctive relief under the broad discretion lodged in it by accepted equitable principles."

Prior to this latter decision, the Court which decided it had had before it in *Mitchell v. Hodges Contracting Company*, 238 F(2d) 380, a situation in which a construction company had completed over 1,100 jobs, with payrolls in excess of $300,000. Out of those 1,100 jobs, the Wage and Hour Division had questioned only five. The trial court found that coverage existed in three of the five jobs, but denied the injunction. In affirming such denial, the Court of Appeals reviewed established principles pertaining to the discretion of the trial courts in matters of this kind, and then said:

> "There was, first, the acknowledged fact that, as a general contractor doing miscellaneous construction work, coverage for this employer was a shifting thing dependent upon the nature of the jobs being performed."

Certainly, that is true in the case at bar. Respondent is a general contractor doing many different types of jobs throughout the Nation.

The Court next said:

> "Despite a lengthy investigation, analysis revealed that in the two-year period and out of over 1,100 contract jobs, only five were questioned. Out of payrolls totaling in excess of $300,000 for this period, only small amounts of disputed overtime were involved."

Let us see how the facts in the instant case compare. Respondent has done approximately 1,200 construction jobs of varying kinds, with varying problems of coverage (R. 118). The value of these jobs has been "in excess of three hundred million dollars" (R. 118).

Despite this volume of work and the varying problems of coverage, Respondent has been involved in court proceedings under the Fair Labor Standards Act only two times—in the case at bar and in a case in New Mexico some years ago where a complicated question of coverage was also involved, *Mitchell v. Zachry*, 127 F. Supp. 377 (R. 118).

At no time has Respondent ever been sued by an employee for any alleged violation of the Act (R. 119). As is shown above (p. 9, n. 4), during the three years immediately prior to the trial hereof, Respondent had a total of 185 jobs, and it concluded that 178 of them, or 96.2% of the total, were covered by the Act.

Most certainly, these facts do not reveal that Respondent is an habitual violator of the Act, or that it flaunts the Act or intentionally violates it. Under such circumstances, the trial court could well have denied any injunction at all, but, in the exercise of its discretion, it saw fit to grant a limited injunction. Clearly it had this discretionary power, and, under the principles announced by decisions of this Court, the exercise of such power should not be distributed by any decision herein.